

COPY

DEPARTMENT OF STATE  
Division of Language Services

(Translation)

TC No. 11287  
R-10/R-I  
French

Source: Norway: Agreements with Foreign Powers.

No. 7, December 9, 1909

ARBITRAL AWARD

rendered on October 23, 1909

In the matter of the delimitation of a certain part  
of the maritime boundary between Norway and Sweden

Whereas:

In a convention of March 14, 1908, Norway and Sweden  
agreed to submit to the definitive decision of a Court of  
Arbitration composed of a President who must be neither a sub-  
ject of either Contracting Party nor domiciled in either  
country, and of two other members, one of whom must be a  
Norwegian and the other a Swede, the question of the mari-  
time boundary between Norway and Sweden in so far as this  
boundary was not settled by the Royal Resolution of March 15,  
1904;

Whereas:

In execution of this convention, the two Governments  
appointed the following persons President and Arbitrators,  
respectively:

Mr. J. A. Loeff, Doctor of Laws and Political Sciences,  
former Minister of Justice, member of the Second Chamber of  
The States General of the Netherlands;

Mr. F.V.N. Beichmann, President of the Court of Appeal  
of Trondheim, and

Mr. K.Hj.L. de Hammarskjöld, Doctor of Laws, former Min-  
ister of Justice, former Minister of Worship and Public

Education,

- 2 -

Education, former Envoy Extraordinary and Minister Plenipotentiary to Copenhagen, former President of the Court of Appeal in Jönköping, former Professor on the Law Faculty at Uppsala, Governor of the province of Uppsala, and member of the Permanent Court of Arbitration;

Whereas:

In conformity with the provisions of the convention, the memorials, answers, and replies were duly exchanged between the Parties and communicated to the Arbitrators within the time limits fixed by the President of the Tribunal;

The two Governments appointed as their agents respectively,

The Government of Norway, Mr. Kristen Johannsen, attorney at the Supreme Court of Norway, and

The Government of Sweden: Mr. C.O.Montan, former member of the Court of Appeal in Svea, Judge of the Mixed Court of Alexandria;

Whereas:

It was agreed in article II of the convention;

1. That the Court of Arbitration shall determine the boundary line in the waters from the point indicated as XVIII on the chart annexed to the plan of the Norwegian and Swedish commissioners dated August 18, 1897, in the sea to the limit of the territorial waters;

2. That the lines bounding the area which may be the subject of dispute as a result of the Parties' conclusions and in which the boundary line shall consequently be established, shall not be drawn so as to include islands, islets, or reefs which are not constantly under water;

Whereas:

It was likewise agreed in article III of the said convention;

1. That the Court of Arbitration will have to decide

whether

- 3 -

whether the boundary line is to be considered either wholly or partly fixed by the delimitation treaty of 1661 with the chart thereto annexed, and in what manner the line so established is to be drawn;

2. That, in so far as the boundary line is not considered fixed by the said treaty and chart, the Court will have to fix the boundary line with due regard for the factual circumstances and the principles of international law;

Whereas:

The agents of the Parties submitted the following conclusions to the Court (conclusions translated),

The agent of the Norwegian Government;

That the boundary between Norway and Sweden in the area forming the subject of the arbitral decision should be determined according to the line indicated on the chart annexed as number 35 to the memorial presented on behalf of the Norwegian Government;

And the agent of the Swedish Government;

1. As regards the preliminary question:

May it please the Court of Arbitration to declare that the controversial boundary line, as regards the space between point XVIII already fixed on the chart of the commissioners of the year 1897 and point A on the chart of the boundary treaty of the year 1661, is only partly established by the said treaty and chart in that the exact position of this point does not clearly <sup>appear therefrom</sup> and, as regards the remainder of the space extending west of the same point A to the territorial boundary, that the boundary line has by no means been established by these documents:

II. As regards the principal question:

1. May it please the Court to be good enough, allowing itself to be guided by the treaty and chart of the year 1661

and taking

- 4 -

and taking into account the factual circumstances and the principles of international law, to determine the controversial boundary line between Sweden and Norway, from point XVIII, already fixed, in such a way that the boundary is at first drawn in a straight line to a point forming the center of a straight line connecting the northern most reef of the Rødskjær, belonging to the Koster islands, that is, the one indicated on table 5 of the 1906 report as surrounded by depth figures 9, 10 and 10, and the reef which is the southernmost of the Svartskjan, belonging to the Tisler islands, and which is provided with a beacon, this point being indicated on the same table 5 as XIX;

2. May it please the Court also to be good enough, with due regard for the factual circumstances and the principles of international law, to establish the remainder of the controversial boundary in such a way that:

- a. Beginning at the point fixed according to the conclusions under paragraph 1, and designated as XIX, the boundary is drawn in a straight line to a point situated in the center of a straight line connecting the northernmost of the reefs called Stora Drammen, on the Swedish side, and Heieknub reef located southeast of Heia island, on the Norwegian side, this point being indicated on the said table 5 as XX, and
- b. Beginning at the last-named point, the boundary is drawn in a straight line due west as far into the sea as the territorial waters of the two States are considered to extend;

Whereas:

- 5 -

Whereas;

The line mentioned in the conclusions of the Norwegian agent is drawn as follows;

From point XVIII indicated on the chart of the commissioners of 1897 in a straight line to a point XIX located in the center of a line between the southernmost reef of the Svartskjaer, which is provided with a beacon, and the northernmost reef of the Rødsakjaer,

From this point XIX is a straight line to a point XX located in the center of a line between the southernmost reef of the Heiefluer (Søndre Heieflu) and the northernmost of the reefs called Stora Drammen,

From this point XX to a point XXa following the perpendicular drawn at the center of the last-named line;

From this point XXa to a point XXb following the perpendicular drawn at the center of a line connecting the said southernmost reef of the Heiefluer and the southernmost of the reefs called Stora Drammen;

From this point XXb to point XXc following the perpendicular drawn at the center of a line connecting Søndre Heieflu and the small reef located north of Kløfningen islet near Mørholmen;

From this point XXc to a point XXd following the perpendicular drawn at the center of a line connecting Midtre Heieflu and the said reef north of Kløfningen;

From this point XXd following the perpendicular drawn at the center of the line connecting Midtre Heieflu and a small reef located west of the said Kløfningen, to a point XXI at the intersection of

the circles

- 6 -

the circles drawn with a radius of 4 nautical miles(at 60 to the degree) around the said reefs.

Whereas;

After the Court had visited the controversial area, examined the documents and charts that had been presented to it, and heard the arguments and the replies as well as the explanations provided at its request, the discussions were declared closed at the meeting of October 18, 1909;

Whereas:

As regards the interpretation of certain expressions which were used in the convention and on which the two Parties voiced different opinions during the discussions,

In the first place, the Court is of the opinion that the clause whereby it will determine the boundary line in the sea up to the limit of the territorial waters has no purpose other than to exclude the possibility of an incomplete settlement which might cause a new boundary dispute in the future;

It has obviously been far from the Parties' intentions to fix the final point of the boundary in advance, so that the Court would only have to determine the direction between two given points;

In the second place, the clause according to which the lines delimiting the area which may be the subject of the dispute as a result of the conclusions of the Parties, must not be drawn so as to include islands, islets, or reefs, which are not constantly under water,

could not

- 7 -

could not be construed in such a way as to imply that the said islands, islets, and reefs should necessarily be taken as points of departure for determining the boundary;

Whereas:

In the two above mentioned respects, the Court therefore retains its full liberty to rule on the boundary within the limits of the respective claims;

Whereas:

According to the terms of the convention, the Court's task consists in determining the boundary line in the waters beginning at the point indicated as XVIII on the chart annexed to the plan of the Norwegian and Swedish commissioners dated August 18, 1897, in the sea, up to the limit of the territorial waters;

Whereas:

With reference to the question of "whether the boundary line is to be considered either wholly or partly fixed by the delimitation treaty of 1661 with the chart annexed thereto", the reply to this question must be in the negative, at least in so far as the boundary line beyond point A on the aforesaid map is concerned;

Whereas:

The exact location of point A on this map cannot be defined absolutely but in any case it corresponds to a point located between point XIX and Point XX, as these two points are fixed hereinafter;

Whereas:

The parties in dispute are in agreement on the

boundary

- 8 -

boundary line from the point indicated as XVIII on the chart of August 18, 1897 to the point indicated as XIX in the Swedish conclusions;

Whereas;

The parties are likewise in agreement on the boundary line from the said point XIX to a point indicated as XX on the charts annexed to the memorials, except for the single difference arising from the question of whether, to determine point XX, the Heiefluer or Heieknub should be taken as the point of departure on the Norwegian side;

Whereas, in this connection:

The Parties have adopted, at least in practice, the principle of division by the medium drawn between the islands, islets, and reefs located on both sides and not constantly submerged, as having, in their opinion, been the principle applied on this side of point A by the the treaty of 1661;

The logical consequence of the adoption of a principle based on such reasons—disregarding the question of whether the principle invoked was actually applied by the said treaty—must be that, in applying it in our time, factual circumstances which existed at the time of the treaty are at the same time taken into account;

Whereas:

The Heiefluer are reefs about which it may be said with a sufficient degree of certainty that they were not above water at the time of the delimitation treaty of 1661,

Therefore



- 9 -

Therefore, at that time they could not have served as a point of departure in a boundary delimitation;

From the point of view mentioned above, Heieknub should therefore be preferred to the Heiefluer;

Whereas;

Point XX being fixed, the boundary line from this point to the limit of the territorial waters remains to be settled;

Whereas:

Point XX is without any doubt located beyond point A indicated on the chart annexed to the delimitation treaty of 1661;

Whereas;

Norway has supported the thesis, which has not been rejected by Sweden, that by the mere fact of the Roskilde peace treaty of 1658 the maritime territory in question was automatically divided between herself and Sweden;

Whereas:

The Court subscribes fully to this opinion;

Whereas:

This opinion is in accord with the basic principles of international law, both ancient and modern, according to which maritime territory is a necessary dependency of land territory from which it follows that at the time when, in 1658, the land territory called Bahuslän was ceded to Sweden, the extent of maritime territory forming the inseparable dependency of this territory had automatically to form part of the cession;

Whereas:

From this reasoning it follows that, to ascertain what may have been the automatic line of division in

1658

-10-

1658, recourse must be had to the principles of law prevailing at that time;

Whereas:

Norway claims that, on this side of the Koster-Tisler line, the principle of the boundary documents of 1661 having been that the boundary should follow the median between the islands, islets and reefs on both sides, the same principle should be applied to the boundary beyond this line;

Whereas:

It is not established that the boundary line determined by the treaty and drawn on the delimitation chart was based on this principle;

There are details and particulars on the line followed which raise serious doubts on this subject;

Even if the existence of this principle were admitted for the boundary line determined by the treaty, it would not follow that the same principle should have been applied in determining the boundary in the outer territory;

Whereas in this connection:

The delimitation treaty of 1661 and the chart of this treaty cause the boundary line to begin between the islands of Koster and Tisler;

In determining the boundary line the direction traveled was from the sea to the coast and not from the coast to the sea;

Hence, one could not even speak of a possible continuation of this boundary line in the direction of the open sea;

Therefore

-11-

Therefore, there is no connection enabling one to presume, without conclusive proof, the simultaneous application of the same principle to the territories located on both sides of the Koster-Tisler line; and

Whereas:

Neither the delimitation treaty nor the chart belonging to it mentions islands, islets, or reefs situated beyond the Koster-Tisler line;

Therefore, in order to keep within the probable intentions of these documents, such islands, islets and reefs must be disregarded; and

Whereas:

The maritime territory, corresponding to a zone of a certain width, presents numerous characteristics distinguishing it from the land territory and the maritime areas more or less completely surrounded by these waters; and

Whereas, in the same connection;

The rules on maritime territory could not serve as directives for determining the boundary between two limitrophe countries much less since in this case it is a question of determining a boundary that must have been automatically marked out in 1658, whereas the aforesaid rules date from later centuries;

The same is true of the rules of Norwegian domestic law concerning the boundary between either private properties or administrative units;

Whereas:

for all these reasons it would not be possible

to adopt

- 12 -

to adopt the method whereby Norway has proposed determining the boundary from point X to the territorial limit;

Whereas:

The principle of a median line to be drawn through the middle of inhabited lands does not find sufficient support in the international law in force in the 17th Century;

Whereas:

The same is true of the principle of the thalweg or most important channel, a principle the application of which in this case is not established, either, by the documents invoked for this purpose;

Whereas:

One is far more in accord with the ideas of the 17th Century and with the notions of law prevailing at that time in admitting that the territory in question must have been automatically divided according to the general direction of the land territory of which the maritime territory formed an appurtenance and in therefore applying the same principle in our times in arriving at a legitimate and justified boundary settlement.

Whereas:

Consequently, the automatic line of division in 1658 must be determined, or--to express exactly the same thing in other words--the present division must be effected by drawing a line perpendicular to the general direction of the coast, while taking into account the need of indicating the boundary in a clear and unquestionable manner and of making it as easy as possible for the

persons

- 13 -

persons concerned to observe such boundary;

Whereas:

It is likewise necessary, in order to know what this direction is, to take into account the direction of the coast on both sides of the boundary;

Whereas:

The general direction of the coast, according to the conscientious expert opinion of the Court, deviates from true north about 20 degrees west;

Hence, the perpendicular must run west at approximately 20 degrees south;

Whereas:

The Parties concur in recognizing the serious disadvantage there would be in drawing the boundary line across important banks;

A boundary line drawn from point XX in a westerly direction 19 degrees south would completely avoid this disadvantage since it would pass just north of the Grisebaer and south of the Skjöttegrunde and would not cross any other important bank;

The boundary line should therefore be drawn from point XX in a westerly direction 19 degrees south in such a way as to pass between the Grisebaer banks on one side and the Skjöttegrunde banks on the other;

Whereas:

Although the Parties have not indicated markers for a boundary line so drawn, there is reason to believe that it is not impossible to find some; and

Whereas:

Other known methods of marking the boundary might if necessary, be used;

Whereas:

-14-

Whereas,

A demarcation attributing the Grisebaaer banks to Sweden is supported by a number of factual ~~circum-~~stances which have been brought out in the discussions, the principal ones of which are as follows:

- a. The circumstance that Swedish Nationals have engaged in lobster fishing in the shoal waters of the Grisebaaer banks for a much longer time, to a much greater extent and with a much larger number of fisherman than by Norwegian nationals;
- b. The circumstance that Sweden has, particularly recently, performed many acts in the vicinity of Grisebaaer arising from her conviction that these localities are Swedish, for example, the erection of beacons, the taking of soundings, and the installation of a lightship, which acts entailed considerable expense, and by which Sweden believed that she was not only exercising a right but, far more, performing a duty, whereas Norway by her own admission took little or almost no interest in the said localities in these various respects;

Whereas, as regards the factual circumstances mentioned in paragraph a. above:

A well-established principle of international law is that one must refrain as far as possible from altering a state of affairs that has existed in fact and for a long time;

This principle finds very special application in the case of private interests which, once they are put on sufferance,\* can not be safeguarded effectively by any even

---

\*Translation of the French text. The Norwegian text might be rendered: ".....interests which once they are encroached upon, effective compensation can with difficulty be made....." -TC

- 15 -

by any kind of sacrifice on the part of the State to which the persons concerned belong;

It is the lobster fishing on the Grisebaaer banks which is by far the most important thing and it is principally this fishing which gives the banks their value as a fishing place;

The Swedes were unquestionably the first to fish for lobster with the aid of the equipment and boats necessary to fish as far out in the sea as the banks in question are located;

Fishing in general is of more importance to the inhabitants of Koster than to those of Hvaler and, at least until fairly recently, the latter were more interested in navigation than in fishing;

From these various circumstances it appears with a probability equivalent to a high degree of certainty that the Swedes worked the banks in question much sooner and much more efficiently than the Norwegians;

The depositions and statements of the witnesses are generally in full accord with this conclusion;

Likewise, the arbitration convention is in full accord with the same conclusion;

According to this convention, there is a certain connexity between the right to fish on the Grisebaaer banks and the upkeep of the lightship and, since Sweden is obliged to maintain the lightship as long as the present situation continues, this shows that according to the reasons of this clause the principal enjoyment of now belongs to Sweden;

Whereas,

-16-

Whereas, as regards the factual circumstances mentioned in paragraph b. concerning the erection of beacons and the stationing of a lightship:

A lightship, which is necessary for the safety of navigation in the vicinity of Grisebaaer, was stationed by Sweden without any protest from Norway and indeed at her suggestion, and a fairly large number of beacons have been set up there without raising any protests;

The lightship and the beacons are always maintained by and at the expense of Sweden;

Norway has taken no measures in any way comparable except to place therefor a short time after the beacons were erected, a whistling buoy the establishment and maintenance costs of which could not even be compared with those of the beacons and the lightship;

It appears from the foregoing that Sweden has not doubted her right to the Grisebaaer and has not hesitated to incur the expense devolving upon the owner and possessor of these banks, even to a very substantial amount;

As regards the taking of soundings, Sweden was the first, some thirty years before the beginning of any dispute, to take exact, painstaking and costly soundings in the vicinity of Grisebaaer, whereas the soundings taken a few years later by Norway did not even reach the limits of the Swedish soundings;

Whereas:

There is no doubt at all that the allocation of the Grisebaaer banks to Sweden is in perfect accord with the most important factual circumstances;

Whereas:



- 17 -

Whereas:

A demarcation allocating to Norway the Skjöttegrunde-- the least important part of the controversial territory-- is sufficiently supported by the serious factual circumstance that, whatever must be concluded from the various documents and testimony, that Swedish fisherman as stated above have plied their trade in the localities in dispute for a longer time, to a greater extent, and in greater numbers, it is certain, on the other hand, that Norwegian fisherman have never been barred from fishing;

Furthermore, it is an established fact that on the Skjöttegrunde Norwegian fishermen have at almost all times participated in the lobster fishing in a manner relatively much more effective than on the Grisebaer.

- For these reasons,

The Court decides and states:

That the maritime boundary between Norway and Sweden, in so far as it was not settled by the Royal Resolution of March 15, 1904, shall be determined as follows:

From Point XVIII, situated as indicated on the chart annexed to the plan of the Norwegian and Swedish commissioners dated August 18, 1897, a straight line shall be drawn to point XIX, forming the center of a straight line drawn from the northernmost of the Rødskaer to the southernmost of the Svartskjaer, being the one provided with a beacon,

From point XIX so fixed, a straight line shall be drawn to point XX, forming the center of a straight line drawn from the northernmost of the Stora Drammen group of reefs to Heieknub reef located woutheast of Heia island,

From Point

-18-

From pointXX a straight line shall be drawn  
in a westerly direction 19 degrees south, this  
line passing midway between the Grisebaer and  
South Skjottegrund and continuing in the same  
direction until it reaches the open sea.

Done at the Hague on October 23, 1909 in the  
building of the Permanent Court of Arbitration.

J. A. Loeff

President

Michiels van Verduynen

Secretary General

Bell

Secretary